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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 947.

GERD H. HERMES,

Petitioner,

—against—

AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED, COMMERCIAL UNION ASSURANCE COMPANY LIMITED OF LONDON, ENGLAND, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, CONN., THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, THE HOME INSURANCE COMPANY, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

GEORGE S. BRENGLE,
Counsel for Respondents.

BIGHAM, ENGLAR, JONES & HOUSTON,
JOHN M. AHERNE,
On the Brief.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement.

The opinion of the Circuit Court of Appeals for the Second Circuit, which this Court is asked to review is reported in 132 Fed. (2d) 715, and appears at pages 99-107 of the record. The opinion of the District Court, though not officially reported, is found in 1942 A. M. C. 233.

Petitioner admits he was guilty of a continuing breach of warranty in a policy of marine insurance covering the hull and tower's liability of his tug "Edwin Duke". Both courts below found on undisputed facts (respondent rested on petitioner's case) that the vessel's loss resulted from damage received while the warranty was being violated. The decision of the Second Circuit Court of Appeals is not in conflict with that of any other circuit. It presents none of the elements which form essential basis of certiorari.

Facts.

While the facts are fully stated in the opinion of the Circuit Court of Appeals, some brief review is desirable because of certain statements, significant omissions and implications in the petition and brief, which the record does not support.

In the policy endorsement covering the tug "Edwin Duke" (hereinafter called "Duke") petitioner warranted that in navigation to Great South Bay (Long Island, New York) by the outside route, *i. e.,* via Fire Island Inlet, this vessel would have "not in excess of one vessel in tow". On December 3, 1940 the "Duke" went to Fire Island Inlet as a part of a tow which consisted of herself and two other tugs (the "Gerd H. Henjes" and "Helen Barbara") all towing four barges loaded with rock (R., pp. 33-35). This was a breach of the towage warranty as both Courts found (R., pp. 72, 103) and as the petition now admits. Upon arriving at Fire Island Inlet on December 4th a new tow was made up for the return or westbound trip (R., pp. 16-17). The new tow consisted of the same three tugs in tandem formation, the "Duke"

leading, and four light barges, also in tandem, following the third tug (R., pp. 38-39, 79). This formation also constituted a breach of the towage warranty as both courts found (R., pp. 73, 103) and as the petition now admits. The effect of this continuing breach was to terminate or suspend the policy coverage. This also petitioner admits.

The reason for the warranty "not in excess of one vessel in tow" is readily apparent from the fact that the "Duke" was a small tug, 69 feet in over-all length (R., p. 14) and having only 200 horsepower (R., pp. 17, 84). The larger tug, "Gerd H. Henjes" (500 horsepower, R., p. 61), was insured under the same policy, but because of her size and horsepower there was no similar warranty. The United States Coast & Geodetic Survey chart No. 1215 (Plaintiff's Exhibit 8, R., p. 83, Stipulation, p. 94) shows that the outside route from East Rockaway Point to Fire Island Inlet is in the unsheltered waters of the open Atlantic where a vessel is exposed to the full rigors of storms from the east, south and west, as the events which led to the loss of the "Duke" readily illustrate. It was to avoid just such dangers that the towage warranty on the "Duke" was designed. A tug owes a very clear duty to the vessels in her tow. She cannot abandon them when danger threatens. When danger is greatest her duty is highest—"a tug is bound by the contract of towage not to abandon both tow and contract when the former gets into trouble * * * when danger arises, the tow cannot be abandoned until all reasonable efforts for its preservation have been exhausted" (*The Joseph F. Clinton,* 250 Fed. 977, 979, C. C. A. 2). It was this clear duty that made it important for underwriters to stipulate that

this small vessel, the "Duke", would have not in excess of one vessel in tow when working in the unsheltered waters referred to above.

While the "Duke" was towing, in admitted breach of this warranty, and proceeding eastward on the return from Fire Island Inlet she ran into trouble. A southwest storm (R., pp. 19, 85) arose, and by 5:30 P. M. the wind was 30 to 40 miles per hour (R., pp. 19, 79), and by 6:30 P. M. the wind increased in violence and the waves were 25 feet high (R., p. 20). Between 6:30 and 8:30 P. M., in the midst of the storm, the hawsers from the "Gerd H. Henjes" to the barges parted on three separate occasions (R., pp. 20-21, 79-80, 86-87), and on each occasion the "Duke", as the leading tug, was *ordered* (by radio telephone) by the master of the "Gerd H. Henjes" to get out of formation and go back to assist them. In going back the "Duke" was not acting as a voluntary salvor (as the petition states) but she was acting under orders and pursuant to her duty to her tow. The third occasion was at 8:15 P. M., three barges had broken loose (R., p. 21); "they were flying like a kite" (R., pp. 43-44) before the wind towards the Long Island shore (R., 130), and the "Duke" was chasing them (R., p. 44). When the "Duke" got a line on the barges her doom was sealed. It was then "blowing a gale" from the southwest (R. 21). She had her hawser on them for 20 or 30 minutes (R., p. 45) and she was making leeway so fast that she was "pounding on the outer bar in the midst of the breakers shipping water heavily in solid sheets. With the rise and fall of the breakers I could feel my tug pound on the bar with considerable force" (R., p. 87). These were her master's words two days after the accident, and on trial he admitted their truth (R.,

pp. 47-48). His "protest" is the same (R., pp. 79-81). This pounding lasted for twenty minutes (R., pp. 48, 80). The petition (p. 4) says the "Duke" merely "touched" or "smelled" bottom, but her master admitted she "struck bottom with considerable force" (R., pp. 47, 141); that she "pounded" (R., p. 87). As a result she started to make considerable water (R., p. 80), so she cut her hawser (R., pp. 24, 80, 87) and her captain decided he "had better try to make Coney Island" (R., p. 24). He therefore "tried to head for New York, running light" (R., p. 87).

Very shortly thereafter, about 9:00 P. M., the water was up to the flywheel (R., p. 87). At 9:30 P. M. she sent out an S. O. S. (R., pp. 25-26) to a Coast Guard cutter (R., p. 81)*, and immediately determined to abandon the ship, because her stern was completely under (R., p. 26). The ship was abandoned (R., p. 27) and sank a short time thereafter.

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals held that the formation of the eastbound and westbound tows was a clear violation of the towage warranty (R., p. 103) citing *Shipowners' & Merchants Tugboat Co.* v. *Hammond Lumber Co.*, 218 Fed. 161; *The Bordentown*, 40 Fed. 682; and *The Geo. W. Pratt*, 76 Fed. (2d) 902, and observed that if the vessel had been lost while in such formations non-coverage would have been clear. Fol-

* This gives petitioner the most favorable inferences possible. Her master swore (Protest, R., p. 79) that she was in danger of sinking for half an hour before she sighted the coast guard cutter. In point of time therefore the blow which caused her to leak is, unerringly, put back to the pounding on the bar, when she started "to make considerable water, being free of water prior to the time we put our hawser on the three barges" (R., p. 80).

lowing *Smith* v. *Northwestern F. & M. Ins. Co.*, 246 N. Y. 349, the Court held that the breach of the warranty merely suspended the policy (R., p. 105), and the policy would reattach after the breach terminated, provided petitioner proved that the sinking, which immediately followed the termination of the breach, was not caused by injuries received while the vessel was operating in breach of the warranty (R., p. 107). The Court said an assured cannot breach the towage warranty at will and then, when the vessel gets into trouble, restore the coverage by the simple expedient of cutting the hawser.

Citing the *Joseph F. Clinton*, 250 Fed. 977, the Court held that the "Duke's" legal and contractual obligations to her tow required her to go to the assistance of the barges; that this continuing obligation prevented her from being regarded as a voluntary salvor, and that her duties in this respect were not discharged until consideration for her own safety required her to cut her hawser and abandon her tow (R., pp. 103-104). The evidence that her mortal wounds were received while she was attempting to discharge her legal duty to the tow, the Court said, was too clear to leave any fair question of fact to be decided by the jury. It pointed too certainly to the actual cause of the loss to leave any fair issue of fact (R., p. 107).

FIRST POINT.

The situation which caused the loss of the "Duke" was created by, and was the natural and inevitable result of, the breach of the towage warranty. The "salvage" argument is invoked to avoid the effect of the admitted breach. In going to the assistance of the barges the "Duke" was acting (1) under orders; and (2) pursuant to her legal and contractual duty to the tow.

The sea perils which caused the loss of the "Duke" commenced to operate at 4:30 P. M., when the gale began to generate, and while she was towing in breach of the warranty. What followed from that time on was but a natural development of the situation created by placing her in that formation. Because she was small and had but 200 H. P., the warranty forbade towage of more than one vessel. It was to avoid just such a situation as she found herself in, that the warranty was designed. The obligations of a tug to its tow are set forth in the *Jos. F. Clinton*, 250 Fed. 977, 979, and because of her size the "Duke" could not, when trouble arose, safely discharge such obligations to more than one vessel.

However, deliberately, wilfully and intentionally she violated the warranty and petitioner now argues that when she was discharging her legal duties to the tow she was not towing, but was engaged in voluntary salvage. This is pure sophistry. First, it is directly contradicted by the facts—the "Duke's" master testified he was acting under orders of Captain Welle, the master of the "Gerd H. Henjes" (R., pp. 16-18) and the latter testified he was in

charge of the whole flotilla (R., p. 63). The "Duke" did *not* voluntarily go to the assistance of the tow—she was *ordered* to do so by Captain Wells (R., pp. 20-21). It is therefore a fact, beyond dispute on this record, that the "Duke" was not rendering voluntary salvage assistance pursuant to 46 U. S. C. A. 728, as petitioner contends, but was following the orders of the person in charge of the tow, who was bound by law and contract, when danger threatened, to exhaust all reasonable means before abandoning his tow.

Thus, whether the "Duke" was 200 or 500 horsepower, her duty was the same. Petitioner knew her size and horsepower when he breached the warranty, and he is now forced to argue the absurd proposition that because she was 200 horsepower, and thus unable to handle three barges in that storm, there was no breach, although he admits by necessary implication that if she were 500 horsepower there would have been a breach. By such specious argument does petitioner strive to avoid the effect of the admitted breach.

Secondly, petitioner's position is flatly opposed to the settled rule of law exemplified by *The Joseph F. Clinton,* 250 Fed. 977, 979. In towing four barges the "Duke" took upon herself with respect to each barge, the legal and contractual duties of a towing vessel, all in violation of the warranty expressly designed to avoid them. This is not a salvage case. We are not here concerned with the precise instant of time in a storm-at-sea situation when a tug's role may change from a towing to a salvaging vessel so as to entitle her to collect for salvage services. We are concerned here with a question of marine insur-

ance coverage, viz., whether the admitted pounding and leaking of a vessel, which occurred while she was operating in breach of a warranty, was the cause of the sinking which almost immediately followed. We readily agree that under certain conditions a towing vessel may render salvage services to her tow, and collect for them (*City of Portland,* 298 Fed. 27; *The Connemara,* 108 U. S. 352; *The City of Haverhill,* 66 Fed. 159), but we say, as the Circuit Court of Appeals said, that this is a suit on an insurance policy—not a suit for salvage—and those cases do not touch the question. They certainly do not give petitioner immunity from the consequences of an established breach of warranty in an action on a policy of insurance.

SECOND POINT.

The Circuit Court of Appeals and the District Court were right in holding there was no fair question of fact to be submitted to the jury.

Respondent rested at the close of petitioner's case. Respondent's whole case (R., p. 270) consisted of one document, the master's protest (R., pp. 79-82), which was already in evidence as part of petitioner's case (Plaintiff's Exhibit 5-e). The facts developed on petitioner's case were therefore admitted. Petitioner's own evidence proved all the facts upon which the District Court and the Circuit Court of Appeals relied in directing a verdict for the respondent. The master's sworn protest, and his statement made two days after the accident (R., pp. 84-89), were introduced by petitioner, and their truth was affirmed by the master on the trial (R., pp. 47-53). This removed

any jury question on credibility. No inferences from this undisputed evidence, other than those drawn by the Court's below, can reasonably or logically be drawn. This is not a negligence case, where the degree of care required of a reasonable man frequently makes a jury issue where facts are otherwise undisputed (*Gunning* v. *Cooley,* 281 U. S. 90). This tug admittedly encountered a sea peril while the policy coverage was suspended by the breach of warranty. When the hawser parted her duty to her tow required her to assist them. While she was discharging that duty the sea peril admittedly caused her to pound on the bar for some twenty minutes. She started to take water instantly, so she cut her hawser and tried to escape. She was obviously then leaking dangerously and she sank shortly thereafter. Petitioner had the burden of showing the loss did not result from the injury admittedly sustained while the policy was suspended (R., p. 107); and these undisputed facts point too unerringly to the cause of her leaking, and ultimate sinking, to say that there was any evidence upon which a jury could properly find a verdict for petitioner.

McGuire v. *Blount,* 199 U. S. 142, 148;
Improvement Co. v. *Munson,* 14 Wall. 442, 448;
Pleasants v. *Fant,* 22 Wall. 116, 122.

There was, therefore, on these undisputed facts no fair question to be submitted to the jury.

THIRD POINT.

This case presents none of the grounds for the granting of a writ set forth in Rule 38.

Despite petitioner's general jurisdictional statement, the petition and brief fail to name a single decision of another circuit with which the decision below is in conflict. Nor is petitioner able to sustain its assertion that the decision is in conflict with prior decision of the Second Circuit in *The Joseph F. Clinton,* 250 Fed. 977, for the Court below expressly cited and followed that case (R., p. 104) and we urge it here. What petitioner really asks is that this Court grant a writ "merely to review the evidence or the inferences to be drawn from it". This, the Court will not do (*General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178), especially on concurrent findings below (*U. S.* v. *Chemical Foundation,* 272 U. S. 1, 14).

No novel or important question is presented, nor is the decision below in conflict with applicable decisions of local or federal law. The Courts below followed the accepted and usual course of judicial proceedings and no situation calling for the exercise of the Court's power of supervision is presented by this record.

Layne & Co. v. *Western Well Works,* 261 U. S. 387, 393;
Hamilton-Brown Shoe Co. v. *Wolf Bros.,* 240 U. S. 251, 258;
Forsyth v. *Hammond,* 166 U. S. 506, 513-514.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari has no merit and should be dismissed.

Dated, May 14, 1943.

Respectfully submitted,

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